No. 7454

United States Circuit Court of Appeals

For the Ninth Circuit

ASA B. CUTLER and FRANK W. CUTLER, co-partners doing business under the name of CUTLER MANUFACTURING CO., CUTLER MANUFACTURING COMPANY, INC., an Oregon corporation, FOOD MACHINERY CORPORATION, a Delaware corporation, formerly known as John Bean Manufacturing Company, F. W. CUTLER, Director, General Agent and Attorney in Fact within the State of Oregon for Food Machinery Corporation, and Cutler Manufacturing Co., a division of Food Machinery Corporation,

Appellants,

vs.

FLOYD J. COOK,

Appellee.

Brief of Appellants

Upon Appeal from the District Court of the United States For the District of Oregon.

JAMES G. WILSON,
JOHN F. REILLY,
Platt Building, Portland, Oregon,
Solicitors for Appellant.

CAREY, HART, SPENCER & McCULLOCH,
FLETCHER ROCKWOOD,
Yeon Building, Portland, Oregon,
Solicitors for Appellee.

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Appellants,

vs.

FLOYD J. COOK,

Appellee.

Brief of Appellants

Upon Appeal from the District Court of the United States For the District of Oregon.

STATEMENT OF CASE

On May 4, 1928, appellants F. W. Cutler and Asa B. Cutler, partners doing business under the name of Cutler Manufacturing Co., and engaged in the manufacture and sale of fruit machinery at Portland, Ore-

gon, entered into a contract with Floyd J. Cook, appellee, which is set out in full at R. pp. 121-131. The salient features of this contract were as follows:

> "1. (Contract, paragraph 1.) The patentee granted to the licensees the exclusive right to manufacture and sell the Cook Grader, with all modifications, alterations, improvements, including attachments thereto, and means of delivering or receiving fruits, sold in connection with the Cook Grader, for a term commencing May 1st, 1928, and ending September 30th, 1933.
>
> "II. (Contract, paragraph 1.) The licensees agreed, during the term of the license, not to manufacture any fruit grading machine of the same nature or used for the same purposes, except such as were then being manufactured by them.
>
> "III. (Contract, paragraph 2.) The patentee agreed to diligently prosecute a reissue of the patent and granted to the licensees the exclusive right of manufacture and sale under such reissue.
>
> "IV. (Contract, paragraph 3.) The licensees agreed to manufacture the Cook Grader to make all necessary blue prints, patterns, jigs, and designs for such manufacture, which then became the property of the licensee.
>
> "V. (Contract, paragraph 3.) The licensees agreed that all Cook Graders should be manufactured from good materials and with good workmanship in keeping with approved methods of mechanical practice and manufacture.
>
> "VI. (Contract, paragraph 4.) The licensees were bound to place the Cook Grader on the market and promote its sale and advertise it with the same diligence with which it promoted the sale of any other machines or products manufactured by them.

"VII. (Contract, paragraph 5.) All orders for graders obtained by the patentee at the date of the contract were assigned to the licensee, who assumed all obligations of the patentee and agreed to fill them promptly.

"VIII. (Contract, paragraph 5.) The licensees bought from the patentee all materials on hand.

"IX. (Contract, paragraph 6.) The licensees agreed to pay the following royalties:

a. 10% of the amount of the sale price of all equipment sold by the licensees, but not less than $50.00 for each fruit grader with a sizing portion of thirty feet or longer, and a minimum royalty for smaller machines in proportion to the length of the sizing portion thereof.

b. All royalties to be due and payable on May 1st, 1929, except that the sum of $300.00 thereof should be paid at the end of each calendar month for a period of twelve months.

c. If on May 1st, 1929, royalties and commissions accruing, exceeded $3600.00 (the amount of the monthly advances) the licensees were at that time to pay the difference. If they were less than $3600.00 that sum should be considered as guaranteed royalties and commissions and the deficit not charged to the patentee.

d. Beginning May 1st, 1929, accruing royalties became payable at the end of each calendar month for all shipments and all deliveries made by the licensees during said month and within fifteen days prior to the end of the month.

e. The licensees obligated themselves to deliver to the patentee on or before the 15th day of each month a written statement showing the amounts of sales, made during the preceding cal-

endar month, with the names and addresses of the customers, and all equipment shipped and/or delivered during each month.

"X. (Contract, paragraph 6.) In addition to the foregoing, the licensees agreed to pay the patentee:

a. A commission of 15% of the amount of all sales of Cook Graders and attachments in the Medford district during the year 1928.

b. A further sum of 15% on all sales of equipment to Henry E. Kleinsorge of Sacramento and the Earl Cook Company of California during the year 1928; provided, that the commission should not be paid on more than four Cook Graders sold to said purchasers.

"XI. (Contract, paragraph 7.) In the event that the commission for the year 1928 and the royalties accruing to October 1, 1931, did not equal or exceed $15,000.00, the licensees agreed to pay such sum as might be necessary to bring up the total to $15,000.00, PROVIDED that the licensees retained the option to withhold payment and cancel the contract by giving the patentee notice in writing to that effect.

"XII. (Contract, paragraph 7.) If the licensees did not pay the deficit last mentioned the patentee had the right at his option to can*d*el by giving ten days' notice.

"XIII. (Contract, paragraph 7.) In the event of cancellation under XI and XII hereof, the licensees had no further right to manufacture or sell the Cook Grader, or any reissue thereof, or any improvements, alterations or modifications of the machine.

"XIV. (Contract, paragraph 8.) Breach by either party of the terms and conditions of the contract gave the other the right to cancel upon giving notice of the specified breach provided, however, that the offending party should have thirty days after such notice within which to make good the breach.

a. Cancellation did not relieve the guilty party from liabilities then existing thereunder.

"XV. (Contract, paragraph 10.) On expiration or earlier termination of the agreement, the patentee obtained exclusive ownership of all improvements, attachments and designs relating to the Grader, or its attachments developed after the date of the contract, irrespective of the party by whom made.

b. Patentable improvements made during the term of the agreement would be made by and at the expense of the patentee.

c. At the expiration or earlier termination of the contract, patentee had the option for thirty days to take over from the licensees all patterns, blue prints, jigs and designs relating to the manufacture of the devises, or the improvements or alterations thereon, at cost.

d. At the expiration or earlier termination of the contract, the patentee had the option for thirty days to take over from the licensees all machines and materials on hand at cost.

e. If the patentee did not exercise this option the licensees were given the right to complete machines in process of manufacture and sell such machines, and any others then on hand, not exceeding, however, ten machines in number, upon which the licensees agreed to pay the same royalties.

"XVI. (Contract, paragraph 11.) If during the term of the contract the licensees sold their business, the patentee had the option,

a. Either to require the purchaser to assume and discharge all of the licensee's obligations under the contract;

b. To cancel and terminate the agreement, put an end to the licensee's right thereunder, and prevent any such rights passing to the purchaser."

The present controversy arose out of Paragraphs Seventh and Eleventh and we accordingly set them out in full:

"SEVENTH: In the event that the commissions for the year 1928 and royalties accruing hereunder to October 1, 1931, do not equal or exceed the sum of $15,000.00, then the company on October 1, 1931, shall pay to the second party such sum as shall be necessary to bring the said total up to $15,000.00, provided that the company shall have the option to withhold payment of such deficit and cancel this contract by giving the second party notice in writing to that effect; and provided further that if the company shall not pay such deficit on or before October 1, 1931, then the second party shall have the right at his option to cancel this contract by giving 10 days notice in writing to the company to that effect; and in the event this contract is so cancelled by either party as herein provided, then said second party shall have the right to manufacture and sell machines, equipment, devices, and attachments, described in said patent or reissue thereof, and all modifi-

cation, alterations and improvements thereof without any claims in favor of the company therein or thereto, as fully as if this agreement had not been made."

"ELEVENTH: If during the term of this contract the company shall sell its business, the second party shall have the option either to require that the purchaser from the company shall assume and discharge all the company's obligations hereunder, or to cancel and terminate this agreement and put an end to all the company's rights hereunder and prevent any rights hereunder from passing to such purchaser from the company."

Following the execution of this contract the Cutler partnership began the manufacture and sale of the Cook Grader, and at the end of the 1928 season, which ended about October 1, 1928, made certain changes in the design of the Cook Grader, and during 1929 manufactured and sold a so-called "Improved Cook Grader."

For several years prior to 1929 the John Bean Manufacturing Company (whose name was afterwards changed to Food Machinery Corporation) made frequent overtures to the Cutlers to buy the assets of the Cutler partnership or merge the partnership with the John Bean Manufacturing Company. These overtures were rejected. In the summer of 1929 further overtures resulted in a tentative agreement looking to a sale of the Cutler partnership assets to the John Bean Manufacturing Company. Appellee, Cook, was advised by

the Cutlers of the proposed sale and notified by them that the John Bean Manufacturing Company was manufacturing a Pear Grader known as the Clear Grader which was in competition with the Cook Grader. Suggestion was made to Cook that the purchaser would permit the Cutler plant to continue the exclusive manufacture and sale of the Cook Grader or that the Cook Grader might be manufactured and sold by all of the units of the purchaser along with the Clear Grader. Appellee rejected the suggestions, insisted upon the exclusive feature of his contract, and stated he would not permit the Cook Grader to be manufactured by the Cutler plant if the purchaser at the same time made the Clear Grader at any of its other plants. (R. 160, 181).

The contract just referred to between the Cutlers and the John Bean Manufacturing Company was not carried out, but negotiations and discussions continued between the officers of the Food Machinery Corporation (John Bean Manufacturing Company) and the Cutlers and between the Cutlers and appellee Cook. The Cutlers organized a corporation,—Cutler Manufacturing Company, Inc.,—articles being filed in November, 1929, and the corporation being organized in February, 1930. To this corporation the Cutler partnership transferred its assets in February, 1930. In March, 1930, the Cutler corporation agreed to transfer its assets, not, however, including the Cook contract, to Food Machinery corporation, and this contract was performed by the transfer in June, 1930, to Food Machin-

ery Corporation of the assets of the Cutler corporation, not including the Cook contract.

In the late fall of 1929 and during the progress of the further negotiations between the Cutlers and Food Machinery Corporation the offer was made to appellee, Cook, by the Food Machinery Corporation to take over the Cook contract if the exclusive feature was eliminated, or, in the alternative, to have the Cutler plant continue to manufacture Cook Graders exclusively. These offers were rejected by Cook. (Master's Report, R. 63-4, Court's Finding XI, R. 134-5).

In December, 1930, appellee commenced this suit by a bill in equity reciting that during 1925 he conceived and commenced construction of a Fruit Grader for which he was granted a patent in 1927, and that he was and still is the owner of said invention; that on May 4, 1928, he was manufacturing and selling his graders successfully and profitably and in competition with the Cutler partnership; that the Cutlers, to eliminate competition and procure plaintiff's machine, solicited the exclusive right to manufacture and sell it and threatened plaintiff that, if he did not agree, they would make a machine so closely similar as to interfere with plaintiff's trade and nullify his patent rights; that, influenced by their threats, appellee entered into the contract of May 4, 1928; that the Cutlers intended at all times to undermine plaintif's trade and suppress his machine for the benefit of their other products; that, in pursuance of this scheme, the Cutlers made changes

in the Cook machine, impairing its efficiency, thereby destroying the market for the machine; that the Cutler partnership was incorporated and the corporation was then merged with and became a division of Food Machinery Corporation; prior to the merging of the Cutler corporation into it, Food Machinery Corporation had obtained the exclusive right to manufacture Clear Graders; that the Food Machinery Corporation refused to carry out the contract of May 4, 1928; that the acts of the Cutlers, individually, and as partners, the Cutler corporation, and the Food Machinery Corporation, both severally and in confederation with each other, caused impairment and loss of the use and sale of Cook's invention; he prayed for an accounting from all of the defendants, asked for damages from them, and for an injunction against their manufacturing any grading machine of the same nature and for the same purpose as the Cook Grader, except such as were manufactured by the Cutler partnership on May 4, 1928. This bill is set out at large (pp. 2-17 of the record.)

The case was referred to a Master who found that appellee was not induced to enter into the contract of May 4, 1928, by any threat; that the Cutlers had no intention to undermine and destroy plaintiff's machine or suppress his invention. (R. 59); that the changes made in the Cook Grader were made in good faith to overcome defects; that the improved Cook Grader was not an inferior device but rendered equally as good results and avoided the defects in the original Cook Grader. (R. 59-60-61-2). No exception was taken to the Mas-

ter's findings upon these points. (See appellee's exceptions to Master's Report, R. 95-100, Court's Finding IX, R. 133, to which likewise no exception was taken.)

The Master further found that the Cutler partnership transferred the Cook contract to the Cutler corporation and when the Cutler corporation sold its assets to the Food Machinery Corporation the latter refused to take over the Cook contract unless the exclusive feature was eliminated but agreed that the Cutler division should handle only Cook Graders. Appellee refused to consent to the manufacture of his invention on any such terms and the Food Machinery Corporation thereupon refused to take over the Cook contract. (R. 63-4). No exception was taken to these findings. The Court also found that appellee declined to consent to any transfer of the contract to the Food Machinery Corporation unless the latter would manufacture the Cook Grader exclusively, that the Food Machinery Corporation was willing to take over the Cook contract, if the exclusive provisions were eliminated, with the understanding that the Cutler division would handle only Cook Graders, but refused to accept the contract if Cook insisted that all of the units of the Food Machinery Corporation should manufacture only Cook Graders. (Finding XI, R. 134-5).

The Master further found that after the sale to the Food Machinery Corporation the Cutler partnership and the Cutler corporation remained bound to carry out the contract of May 4, 1928, to which finding those

appellants excepted. (Exceptions I, II and III, R. 101-3). These exceptions were overruled by the Court (R. 108). The master further found that the period of the contract should be considered as terminated on October 1, 1931, since Cook had actual knowledge in 1930 that the Cutler partnership looked upon the contract as then terminated and refused to perform further in any respect then or in the future. (R. 83). To this finding appellee excepted (Plaintiff's exception I, R. 95-6).

The Master further found that the Cutler partnership and the Cutler corporation manufactured and sold during 1930 six Cook Graders out of the total sales by all manufacturers of twenty-six Graders; that the Cutler partnership and the Cutler corporation should have sold at least forty per cent of the sales; that the total sales by all manufacturers during that year represented but sixty per cent of the market which should have been 43 machines, of which forty per cent would be 17 machines; he gave no credit for the 6 machines actually sold, the royalties on which had already been paid, but allowed damages for 1930, consisting of royalties on 17 machines, at the rate of $50.00 each, that being the minimum royalty provided in the contract for machines of a length of 30 feet or over.

For 1931 the Master found that the total number of machines sold by all manufacturers was 20. He again assumed that this represented sixty per cent of the market so that 33 machines should have been sold during

that year, of which 40% or 13 should have been sold by the Cutler partnership and the Cutler corporation. He therefore allowed damages to the extent of $50.00 each for 13 machines. (R. 82-3).

To these findings of damages the Cutler partnership and the Cutler corporation excepted, on the ground that there was no evidence that the total number of machines sold by the whole trade in either year should have been any greater than the actual sales and that the forty per cent should be of the actual sales and not of any theoretically larger market. (Exception IV, R. 103). The taking of an exception to the obvious oversight in failing to give credit for the 6 machines which were manufactured and sold during 1930, and for which royalties were paid to appellee, was overlooked. Attention is called to this item, however, and it will be of some importance if this Court determines, as did the Master, that damages should be allowed consisting of royalties on machines that should have been manufactured up to October 1, 1931, instead of on the basis adopted by the Court as shown in the next paragraph.

Both parties excepted to these findings of the Master on damages, and the Court although not so stating, expressly, eliminated all such damages, and in lieu thereof, allowed appellee the difference between the amount of royalties and commissions paid by the Cutler partnership and the Cutler corporation to appellee and $15,000.00 (R. 138), relying upon the provisions of Article Seventh of the contract (R. 127-8), although the suit

was started almost a year prior to the date (October 1, 1931) referred to in that article and no supplemental pleadings were filed.

The Master allowed the further sum of $5,000.00 damages against the Cutler partnership and the Cutler corporation for loss of good will and expense of re-establishing a market for the Cook Grader with the comment that he was not unaware that it "closely borders on speculation." (R. 83-4).

To this allowance of damages the Cutler partnership and the Cutler corporation excepted on the ground that there was no evidence from which any value could be placed upon the alleged good will or as to the amount of money necessary to rebuild it if lost; that the allowance of said amount was not based on the record but on speculation and conjecture; that appellee had ample notice of the disaffirmance of the contract in January, 1930, and ample opportunity to continue advertising and sales efforts. (Exception V, R. 104). This exception was overruled by the Court. (R. 108). The Court also allowed this sum in its Finding XVIII. (R. 138-9). The Cutler partnership and the Cutler corporation excepted to said finding when proposed (R. 112) and said exceptions were overruled. (R. 117).

The questions involved all arise on exceptions to the master's report and to the Court's findings and Conclusions of Law and are as follows:

1. Whether the Cutler partnership and the Cutler corporation, upon the transfer of the Cutler business,

except the Cook contract, to Food Machinery Corporation remained bound to continue performance of the Cook contract in view of the provisions of Paragraph Eleventh thereof, and further in view of the refusal of appellee Cook to permit the purchaser, Food Machinery Corporation, to continue manufacture of the Cook grader unless it would agree to breach its contract to manufacture Clear Graders and his refusal of its offer to manufacture exclusively Cook Graders at its Portland (Cutler) branch? (Exceptions I, II and III to Master's Report, R. 101-3).

2. If the foregoing question be answered in the affirmative, then were the Cutler partnership and the Cutler corporation required under Paragraph Seventh of the contract to pay to Cook the difference between the royalties and commissions paid to him up to October 1, 1931 and $15,000, in the absence of written notice of cancellation given on or about October 1, 1931, in view of the following admitted facts: during the negotiations for the sale to the Food Machinery Corporation the offer was made to Cook that the Food Machinery Corporation would manufacture and sell Cook Graders at the Portland (Cutler) plant to the exclusion of any competing grader, which offer Cook refused; in January, 1930, the Cutler partnership informed Cook that the partnership considered the contract terminated and refused to perform it further then or in the future; in March, 1930, a similar notification was given Cook by the Cutler corporation; in June, 1930, with Cook's knowledge, the transfer was made to

the Food Machinery Corporation, thereby disabling the Cutler partnership and the Cutler corporation from continuing performance of the Cook contract, except with the consent of Cook, which consent was withheld; Cook made no objection to the transfer from the Cutler partnership to the Cutler corporation, or to the transfer from the Cutler Corporation to Food Machinery Corporation until a month after the latter was completed, except his oral assertion of his right and intention to compel Food Machinery Corporation to manufacture Cook Graders exclusively; this suit praying for injunction against the manufacture of any grader, except the Cook grader, by any or all of the defendants, and for damages for breach of the contract was filed in December, 1930; on February 12, 1931, the Cutler partnership and the Cutler Corporation answered the bill of complaint, asserting the contract recognized their right to sell their business (R. 24), and that the contract was terminated by the sale and Cook's refusal to permit continued manufacture of the Cook Grader (Paragraphs XX and XXI of Answer, R. 33-4, R. 36, R. 40); no supplemental bill of complaint was filed; the master found that if the contract had been fully performed up to October 1, 1931, the additional royalties which could have been earned for Cook would have been $1500.00 (R. 82-3) which, added to the royalties and commissions paid to Cook, would amount to far less than $15,000.00; the only exception filed by plaintiff to this finding was to the royalties per machine, it being asserted the royalties which would have

been earned would have amounted to $3,000 which sum, added to the royalties and commissions previously paid Cook, again amounts to much less than $15,000.00.

This question arises on the Court's decision that Cook is entitled to the difference between $15,000 and the royalties and commissions paid him (R. 108); the Court's finding XVII (R. 138) and the objections of the defendants thereto (R. 111); the Court's Conclusion of Law I (R. 140-141), and the objection of the defendants thereto (R. 113) and the overruling of said objections. (R. 117).

3. Whether there was any evidence to support the Master's finding that Cook was damaged in the further sum of $5,000 for loss of good will and the expense of rebuilding demand for his invention (R. 84) which finding was adopted by the Court (R. 108) and incorporated in the Court's findings. (R. 139). This question arises on defendant's Exception V to the Master's Report (R. 104) which was overruled by the Court (R. 108); the adoption by the Court of this finding of the Master (R. 139), the objection of defendant thereto (R. 112) and the overruling of said objection. (R. 117).

4. Whether, if appelle is entitled to any damages, he should not be limited to damages for 1930 or at most until October 1, 1931, he having absolute notice in January, 1930, of the refusal of the Cutler partnership to proceed further and having taken no steps whatever to minimize his damage.

This question arises from Exception V of defendants to the Master's Report (R. 104), the overruling thereof by the Court (R. 108), Defendants' objections VII, VIII and IX (R. 112-113), to the Court's Finding XVIII (R. 138-9), and the overruling of said objections (R. 117).

5. Whether, in the accounting between the parties, the Master and the Court should have taken into account items claimed by appellee under a separate and distinct contract not referred to in the pleadings, thereby reducing the amount paid to appellee on the contract of May 4, 1928, on the theory that the Cutler partnership should have paid appellee more on this outside contract than it did.

This question arises on the finding of the Master (R. 85-6), that an oral contract was entered into between the parties making appellee the agent of the partnership in the Medford district during 1928, that the terms of the oral contract are in dispute, that the partnership allowed appellee all of the commissions they thought he was entitled to (R. 86), being the commissions on all orders "as to which they believed he was the inciting cause" (R. 86), that the Master found the oral contract to be one to pay Cook commissions on all sales in the district whether procured by Cook or not (R. 85-86), that the partnership should have paid appellee upon this outside oral contract $291.53 more than it did pay him (R. 88), that the Master thereby reduced the payments to appellee under the contract of May 4, 1928, by said sum.

This question arises on Defendants' Exception VI to the Master's Report (R. 104-5), the overruling of the exception (R. 108), the Court's Finding XVI (R. 137), Defendants' objection IV (R. 111), and the overruling of said objection (R. 117).

6. Whether instead of plaintiff being entitled to recover from any of the defendants the Cutler partnership and the Cutler corporation were entitled to recover $1166.72 overpaid to appellee.

This question arises on the third affirmative answer, (R. 38-41), to the bill of complaint, alleging the partnership and the corporation had overpaid appellee, the Master's finding that, after deducting the $291.53 referred to in the previous question, the Cutler partnership and Cutler corporation had paid appellee $875.19 more than he had earned in royalties and commissions, (R. 89-90), the Court's Findings XVI and XVII (R. 137-138), the Court's Conclusions of Law (R. 140-141) and defendants' objections to said Findings and Conclusions. (R. 111, 113).

ASSIGNMENT OF ERRORS

The decree of the District Court was erroneous in the following particulars:

(a). In that it is based upon a finding of the Master to which the following exception was taken by appellants Asa B. Cutler, Frank W. Cutler, and Cutler Manufacturing Company, Inc., and overruled by the Court:

"That the Master has at pages 22 and 23 of his report erroneously and incorrectly interpreted the contract of May 4, 1928, between plaintiff and defendants, F. W. Cutler and Asa B. Cutler, copy of which is attached to the answer of Asa B. Cutler and F. W. Cutler, and Cutler Manufacturing Company, Inc., a corporation, and has based his recommendation for a recovery against these excepting defendants upon said erroneous interpretation of said contract. The particular error in interpretation asserted by these defendants is that the Master interpreted section 11 of said contract as giving to the plaintiff his choice of three options:

1. In the event of a sale of the business of Asa B. Cutler and F. W. Cutler, a partnership, to make an agreement with the purchaser by which the purchaser assumed all of the obligations of said contract.

2. Notwithstanding such a sale, to require these excepting defendants to continue full performance of said contract, and

3. To cancel the contract in its entirety whereas these excepting defendants assert that said contract gave to plaintiff in the event of the sale of the business of Asa B. Cutler and Frank W. Cutler, a choice of two options only:

1. To agree, if he could, with the purchaser that the purchaser would assume all of the obligations of the contract, or

2. To cancel and determine the contract in its entirety except as to the part already performed.

In presenting this exception these excepting defendants will refer to the contract of May 4, 1928, and to the testimony of F. W. Cutler, pages 898-900 of the transcript of testimony transmitted to the Court by the Master." (R. 101-2). Assignment XII (R. 234).

(b) In that it is based on the report of the Master to which the following exception was taken and overruled by the Court:

"That the Master has at pages 23-29 of his report rejected the contention of these defendants that the provisions of Section 11, if construed as giving to plaintiff alone an option to cancel in the event of a sale of the business of Asa B. Cutler and F. W. Cutler, were void for lack of mutuality." (R. 102) Assignment XIII. (R. 234).

(c) In that it is based on the report of the Master to which the following exception was taken and overruled by the Court:

"The Master found at page 29 of his report that upon the sale of the business of Asa B. Cutler and F. W. Cutler to Cutler Manufacturing Company, Inc., the partners remained bound and plaintiff had a right to demand performance both by the partnership and by Cutler Manufacturing Company, Inc., whereas there was no testimony of any exercise by plaintiff of any option to which he was entitled under said contract of May 4, 1928." (R. 102-3). Assignment XIV. (R. 234).

(d) In that it is based on the report of the Master

to which the following exception was taken and overruled by the Court:

"In computing the damages against these excepting defendants the Master at pages 32-33 of his report assumed that, if these excepting defendants had continued full performance of said contract of May 4, 1928, during the years 1930 and 1931, they could have sold Cook graders to the extent of forty per cent of the total fruit graders sold by the whole manufacturing trade during those years, and that the total number of machines sold represented only sixty per cent of the market so that these excepting defendants could and would have sold not only forty per cent of all fruit graders actually sold by the whole trade but also forty per cent of a theoretically larger market presumably to be created by the efforts of these excepting defendants. These excepting defendants assert that there was no evidence that the total market would have been any greater, or the total number of machines sold by the whole trade any greater during 1930 and 1931 if these excepting defendants had continued in full performance of said contract of May 4, 1928." (R. 103-4). Assignment XV. (R. 235).

(e) In that it is based upon the report of the Master to which the following exception was taken and overruled by the Court:

"The Master has found in his report at pages 34 and 35, in computing damages against these excepting defendants, that the sum of $5,000.00 should be included

for loss of good will or prestige of the Cook Grader due to the cessation of advertisements and sales efforts by these excepting defendants. These excepting defendants assert that there was no evidence received from which any value could be placed upon this alleged good will, or as to the amount of money and time necessary to rebuild it, if it was in danger of loss, or was lost, and the allowance of said amount is based not on the record but upon speculation and conjecture. Moreover, the Master found at pages 33-34 of his report that the evidence clearly establishes that plaintiff had actual knowledge in 1930 that both the Cutlers, as individuals, and the Cutler Manufacturing Company, Inc., had disaffirmed the contract, and therefore had ample opportunity to protect the good will of his Cook Grader by advertisements and sales efforts of his own. The date of such disaffirmance was in January, 1930, as disclosed by the testimony of the plaintiff Cook at pages 563 and 565 of the transcript of testimony" (R. 104). Assignment XVI. (R. 235).

(f) In that it is based on the report of the Master to which the following exception was taken and overruled by the Court:

"The Master, in stating the account between the plaintiff and these excepting defendants, found at pages 36 and 37 that there was an oral contract outside and independent of the contract of May 4, 1928, that the plaintiff Cook should act as a general sales representative of defendants, Asa B. Cutler and F. W. Cutler in the Medford district, and at page 39 found that the

accounting submitted by Asa B. Cutler and F. W. Cutler on the hearing omitted numerous items of commissions earned by the plaintiff Cook outside of the contract involved in this suit, amounting to $291.53, and he allowed plaintiff Cook credit in the account for that sum. At page 36 of his report he found that in stating the account between the plaintiff Cook and defendants Asa B. Cutler and F. W. Cutler under the contract of May 4, 1928, involved in this suit, the Cutlers had also allowed Cook 'A commission on all orders as to which they believed he was the inciting cause.' These excepting defendants assert that whether or not Cook had an outside oral contract with Asa B. Cutler and F. W. Cutler, and whether Cook was fully paid under said outside contract, is immaterial in this suit, not being pleaded or relied on in the complaint, that the Master was powerless to make any finding as to whether the Cutlers had paid to Cook the full amount due under said outside contract, and that in stating the account between the parties under the contract of May 4, 1928, involved in this suit, the Master's inquiry as to the outside contract should have been limited to an inquiry as to what the Cutlers actually had allowed Cook under said outside contract, the balance of the payments to him being applicable to the contract of May 4, 1928, and not what the Cutlers should have allowed Cook." (R. 105). Assignment XVII. (R. 235).

(g) In that it is based on the report of the Master to which the following exception was taken and overruled by the Court:

"The Master recommended at page 40 of his report that plaintiff recover his costs against defendants, F. W. Cutler and Asa B. Cutler, as co-partners, and Cutler Manufacturing Company, Inc., whereas approximately two-thirds of all of the hearing before the Master consisted of the unsuccessful attempt of the plaintiff to prove the allegations of the complaint that there was a conspiracy on the part of all of the defendants to eliminate competition, that the defendants Cutler intended to undermine and destroy plaintiff's machine and business and suppress his products and to impair the efficiency of the machine so as to make it unsuitable for fruit grading, that the Cutlers coerced plaintiff into making the contract of May 4, 1928, by threats to interfere with plaintiff's trade, and nullify his patent rights, that the Cutlers, under the pretense of making improvements in the Cook Grader, made changes in it which did in fact decrease its efficiency and value in the trade, all of which issues were found against plaintiff by the Master and found to be wholly unsupported. With the elimination of the charges so unjustifiably and unnecessarily made the case would have been a simple one, requiring approximately one-third of the time which the Master was actually compelled to devote to the case, and this fact renders it inequitable to assess all the costs against these excepting defendants." (R. 106). Assignment XVIII. (R. 235).

(h) In that it is based partly on the following exception taken by appellee and sustained in part by the Court:

"1. The report is in error in that the Master has applied an incorrect interpretation of the contract of May 4, 1928 (see Exhibit I, attached to answer of F. W. Cutler and Asa B. Cutler), and in particular of paragraph Seventh of said contract.

2. The Master has construed the acts of the defendants F. W. Cutler and Asa B. Cutler in selling their business to Food Machinery Company, in 1930, as the equivalent of cancellation of said contract of May 4, 1928, under the provisions of paragraph Seventh thereof (Report, pp. 33, 34). Plaintiff asserts that the acts of said defendants in disposing of their business and ceasing to perform their obligations under the contract of May 4, 1928, did not constitute a cancellation within the meaning of said paragraph Seventh. As a consequence defendants F. W. Cutler, Asa B. Cutler and Cutler Manufacturing Company, Inc., on account of their breaches of the contract of May 4, 1928, are liable to plaintiff in an amount, based upon facts found by the Master shown in the following table:

(a) Difference between the sum of $15,000.00 and $9,501.19 royalties actually paid up to October 1, 1931, ($6,751.76 plus $2,749.43; Report, pp. 39, 40) payable on October 1, 1931, under terms of said paragraph Seventh. ..... $ 5,489.81

(b) General damages resulting from destruction of market for plaintiff's

machine caused by failure of defendants to perform their obligation under the contract to produce and market plaintiff's machine, being the same element and in the same amount as determined by the Master (Report, pp. 34, 35) 5,000.00

(c) Estimated royalties on additional machines which would have been sold between October 1, 1931, and September 30, 1933, had defendants performed their obligations under the contract of May 4, 1928, (Estimated on basis used by Master, Report, p. 33. Thirty machines during the 2-year period, or 15 machines per year, at $100 average royalty per machine —See Exceptions II) 3,000.00

Total.....$13,498.81

3. The result of a correct interpretation of the contract, applying the facts as found by the Master, is that plaintiff is entitled to recover $13,498.81 instead of $5,520.81, recommended by the Master." (R. 95-6-7.) Assignments V, VII, XI. (R. 232, 233, 234).

The part of said exception sustained by the Court consisted in the allowance of the difference between the royalties and commissions paid by the Cutler partnership and the Cutler corporation to appellee, but the

amount allowed by the Court on this item was $7,-035.38 instead of $5,489.81 as claimed in said exception.

The Court also sustained the allowance of $5,000.00 for loss of good will, being item (b) in said Exception I. (R. 108, 141).

(i) That the Court erred in finding, holding and deciding that under the contract of May 4, 1928, and particularly Paragraph Eleventh thereof that if the defendants Asa B. Cutler and Frank W. Cutler should sell their business, they, the said Asa B. Cutler and Frank W. Cutler, were obligated to continue to manufacture the Cook Grader, and on failure so to do it was a breach of said contract of May 4, 1928. (R. 231).

(j) That the Court erred in holding and deciding that Paragraph Eleventh of the contract of May 4, 1928 was a cumulative remedy made available to the plaintiff and did not prescribe the exclusive remedy open to the plaintiff in the event the defendants Asa B. Cutler and Frank W. Cutler should sell their business, and in not limiting the plaintiff to his right to cancellation of said contract and the taking back of all rights under said patent on the happening of the event of sale and the inability of the said plaintiff to persuade the said purchaser to manufacture the Cook Grader to the exclusion of any competing machine. (R. 231).

(k) That the Court erred in not holding and deciding that the parties had prescribed in their contract the exclusive rights of the said parties in the event of

the sale of the business by Asa B. Cutler and Frank W. Cutler. (R. 232).

(l) That the Court erred in holding that said contract, and particularly Paragraph Eleventh thereof, did not permit the defendants Asa B. Cutler and Frank W. Cutler to sell thier business without incurring a penalty as for the breach of said contract. (R. 232).

(m) That the Court erred in holding that under Paragraph 7 of said contract the parties contemplated that the royalties and commissions thereunder should at least equal the sum of $15,000.00 up to October 1, 1931, and measuring the damages of the plaintiff up to that point by the difference between the amount of royalties and commissions paid under said contract and the said sum of $15,000.00 (R. 232).

(n) That the Court erred in holding and deciding that because no notice was given by the defendants to the plaintiff on or about October 1, 1931, of the cancellation of said contract that said contract continued in effect until October 1, 1933. (R. 233).

(o) That the Court erred in holding and deciding that the general damages sustained by the plaintiff until October 1, 1933, amounted to the sum of $5.000.00. (R. 233).

(p) That the Court erred in failing to hold and decide that there was no evidence to sustain any general damages and that the damages should have been limited, if any, to the amount of royalties which would

have been earned up to and including the first day of October, 1931. (R. 233).

(q) That the Court erred in not holding and deciding that by the commencement of said action prior to the 1st day of October, 1931, that said defendants elected to treat the sale of said business by the defendants Cutler and Cutler Manufacturing Company as a breach of said contract and that his damage was limited to actual damages consisting of the amount of royalties which he would have earned up to October 1, 1931. (R. 233).

(r) That the Court erred in holding and deciding that no notice of cancellation of said contract was given and that the commencement of said action was not a waiver on the part of the plaintiff of any written notice of such cancellation on and after October 1, 1931. (R. 234).

(s) That the Court erred in failing to find in favor of the defendants Asa B. Cutler and Frank W. Cutler and Cutler Manufacturing Company, Inc., on their counterclaim pleaded in their answer. (R. 235).

(t) That the Court erred in decreeing any right to issue execution against any property acquired by the Food Machinery Corporation from the other defendants in said cause in the event execution against the other defendants should be returned unsatisfied. (R. 235).

(u) That the Court erred in not decreeing that said contract of May 4, 1928, lacked mutuality in that it

recognized the right of the defendants Cutler to sell their business and as interpreted gave to the plaintiff an option to cancel the contract without any corresponding right on the part of the defendants Cutler. (R. 235-6).

(v) That the Court erred in not holding and deciding that the so-called agency contract of the plaintiff at Medford for the year 1928 did not give the plaintiff the right to a commission on all sales in the Medford district during said year, but gave to the plaintiff only the right to a commission upon sales made or induced by the plaintiff. (R. 236).

(w) That the Court erred in not decreeing the costs in this case in favor of the defendants and against the plaintiff, and particularly the Court erred in not decreeing costs in favor of the Food Machinery Corporation. (R. 236).

(x) That the Court erred in the event that the said decree should be affirmed in any particular in not decreeing to the defendants and against the plaintiff costs and disbursements, and particularly reporter's fees, and the cost of the transcript for the taking of all testimony on the issues decided in favor of the defendants. (R. 236).

ARGUMENT

I.

DID THE SALE BY THE CUTLER CORPORATION TO THE FOOD MACHINERY CORPORATION OF ALL OF THE CORPORATION ASSETS, EXCEPT THE COOK CONTRACT, THE PURCHASER NEITHER ACQUIRING THE COOK CONTRACT NOR AGREEING TO BE BOUND BY ITS TERMS, RENDER EITHER THE CUTLER PARTNERSHIP, OR THE CUTLER CORPORATION, OR BOTH, LIABLE TO PERFORM THE COOK CONTRACT FURTHER?

This question finds its answer in the interpretation to be placed on Paragraph Eleventh of the contract, reading as follows:

> "If during the term of this contract the company shall sell its business, the second party shall have the option either to require that the purchaser from the company shall assume and discharge all the company's obligations hereunder, or to cancel and terminate this agreement and put an end to all the company's rights hereunder and prevent any rights hereunder from passing to such purchaser from the company."

The interpretation which appellee claimed should be put on this paragraph is that it forbade any sale of the partnership business unless the purchaser was willing to assume and be bound by all of the provisions of the Cook contract and that the Cutler partnership and

the Cutler corporation breached the Cook contract when the corporation sold all of its assets, except the Cook contract, to the Food Machinery Corporation. The Master rejected this interpretation and no exception was taken thereto, so it is out of the case.

The Master construed the paragraph to mean that Cook had three options,—

a. To consent to the assignment to the purchaser on condition that the latter assumed all the obligations of the contract, and if the purchaser declined so to do Cook could,—

b. Insist that the Cutlers continue to perform; or

c. He could cancel and terminate the agreement.

To this decision of the Master the appellants excepted—Exceptions I, II and III. (R. 101-3). The basis of these exceptions was that there was no option given Cook by this paragraph to require the partnership, notwithstanding such sale, to continue performance of the contract. Therefore, both appellants and appellee are agreed that the purchaser of the balance of the business could not be compelled to perform the contract, and the only question is whether the partnership could be required to continue performance.

The circumstances leading up to the incorporation of this provision in the contract are important. During the negotiations the parties called upon the partnership's attorneys, but one of them was away, and the

other engaged in some work which prevented his then taking up the matter, and it was agreed that Cook's attorney should draw the contract. (R. 150, R. 161-2). Paragraph Eleventh was the last thing put into the contract. Cook says there was a conversation in which he demanded that some such clause be put in and then he went to his attorney who drew the paragraph and the contract was signed. (R. 162). He did not give the details of the conversation. Mr. F. W. Cutler, who conducted the negotiations for the partnership, said that in the conversation Cook said there was nothing in the contract about the partnership selling out to anybody and asked where he would be if they should sell out. He said further that his attorney thought there ought to be something in the contract about selling out. Cutler then told Cook the following:

"Well, now, it is all right with me, then, if you will have your attorney add a clause to the agreement we have now got that if you don't like any purchaser—anybody that we might sell our business to"—he brought that point up before, that he might not like the next fellow; he had confidence in us, but he might not like the purchaser—I said, "If you can't make a deal with the purchaser and don't like him, you can put a provision in the contract that you can take your rights back under the license, under your patent." (R. 154).

The contract was drawn up without any direct consultation between Cutler and Cook's attorney, except through Cook as an intermediate. (R. 156).

This paragraph, it will be observed, recognizes the right of the partnership to sell its business. The accomplishment of the sale was a condition precedent to the creation of any option in Cook. It must be assumed that the lawyer who drew the contract knew that the parties could not bind any third person not a party to it. It must be further assumed that, if the lawyer intended to draft a provision forbidding the sale of the business to any person who was unwilling to assume the Cook contract, he could and would have stated so clearly. What the lawyer clearly had in mind was that, if the purchaser was not willing to assume the contract, Cook could cancel it, and, if the purchaser was willing to assume it, Cook had the option of permitting him to do so or cancelling, if he did not like the purchaser or could not make a satisfactory deal with him. Unfortunately the lawyer who drew the contract died before the controversy arose.

In September, 1929, Cook was advised of the proposed sale and that the purchaser probably would not be willing to assume the Cook contract with its exclusive features unmodified, and he then insisted he would not permit the purchaser to manufacture the Cook machine if it continued to manufacture the Clear machine. (R. 160, R. 181-2). Later the purchaser offered to take over the contract and manufacture the Cook machine exclusively in the Portland (Cutler) plant, an offer which Cook refused. (Master's report, R. 63-4). In January, 1930, the purchaser, in view of Cook's attitude, definitely decided not to take over the Cook con-

tract, and Cook was so advised at that time. (R. 160, R. 148). In February, 1930, the partnership sold its business to the Cutler corporation and Cook was so advised by letter of April 5, 1930. (Plaintiff's Exhibit 12). He and his attorney had previously been advised (March 17, 1930) of the transfer, and of the intended transfer, to the Food Machinery Corporation. (R. 182). If Cook, or his attorney, had interpreted the contract as imposing any limitation on the right of the partnership to sell its business, he would undoubtedly have attempted to enjoin the transfer to the Food Machinery Corporation.

From the conversation which preceded the drafting of this paragraph it is apparent that the parties either assumed the contract was assignable without Cook's consent or else that the balance of the Cutler business could be sold and the contract retained by the Cutlers, in which event Paragraph IV of the contract, measuring the diligence to be used by the Cutlers in promoting sales by the diligence used by them in selling their other products, would excuse them from any diligence whatever, and Cook would be entitled neither to damages nor the right to retake control of his patent. It appears from the record that Cook had had some conversation with his attorney about the possibility of his patent being shelved by incorporation of the business and the transfer of the rest of the business to the corporation. Whichever understanding Cook had of his rights, without some paragraph providing for the contingency of a sale, he was quite clear in his mind that he wanted

the unrestricted right to cancel in the event of the sale of the Cutler business. The provision about requiring the purchaser to assume the contract was plainly the result of F. W. Cutler's suggestion that if Cook didn't like the purchaser, or, could not make a deal with him, then he could take back the license. (R. 153-4).

Paragraph Eleventh is by no means a model of clarity. It is ambiguous and might be construed in several ways. Therefore, the conversations preceding its drafting are important as an aid to its construction. With the aid of those conversations the meaning of the paragraph becomes clear.

First, it becomes clear that the reference to a sale of the business as though it were the unquestioned right of the partnership to sell resulted from the fact that none of the parties had any thought that any limitation was intended to be put upon the right to sell. Next it is apparent the parties intended that in the event of a sale Cook was to have the right to veto the transfer of the contract to the purchaser, if the purchaser was not satisfactory to him. Also, if he could not prevail upon the purchaser to take the contract in its entirety, he reserved the right to prevent the purchaser from getting any interest in the contract.

At the time of the sale Cook's attorney, who drew the contract, had died, and his new attorney apparently advised Cook that this paragraph gave him the right to compel the purchaser of the Cutler business to assume the burden of the contract and manufacture his

machine exclusively. Therefore, in July, 1930, Cook served notice on the purchaser, as well as the Cutler partnership, and the Cutler corporation, demanding that they all perform the contract. The same position was asserted throughout the trial before the Master, but, after the Master had filed his report rejecting Cook's contention in this respect, Cook employed new counsel and the contention was apparently abandoned. No exception was taken by appellee to the Master's ruling.

If it be conceded that the contract did not limit the right of the Cutlers to sell their business, then the Master's interpretation of Paragraph Eleventh as giving Cook an option to require the Cutlers to continue performance of the contract could hardly have been within the contemplation of the parties. Before the sale the Cutlers had an extensive manufacturing plant, after the sale they would have none. Before the sale they were engaged in manufacturing many other kinds of fruit machinery. After the sale they would be manufacturing nothing but Cook machines. The contract required them to use the same diligence in pushing the sales of Cook machines as they used for their other products—no more, no less. After the sale they would have no other products.

If the parties had intended that Cook should have the right to require the Cutlers to get a new plant there would of necessity be a substantial part of the contract period devoted to getting that new plant into opera-

tion. When it was in operation its product would be divorced from all of the other Cutler products through which the contract with the fruit business had been built up and was maintained. It is hardly likely that these contingencies would not have occurred to the contract parties and some provision would have been made about them. Therefore, it seems clear that the parties intended this clause to embody the oral understanding testified to by F. W. Cutler—that Cook should have the right, which he thought he would not otherwise have, to prevent assignment of the contract to any purchaser unsatisfactory to him, in which event he could exercise that right by cancellation.

II.

IN ANY EVENT THE CUTLERS DID NOT VIOLATE THE CONTRACT. INSTEAD, THEY OFFERED TO MANUFACTURE THE COOK GRADER EXCLUSIVELY AT THE PORTLAND PLANT.

ARGUMENT

The contract assumes the Cutlers had the right to sell their other business. The Master found they had the right to do so. No exception was taken to this finding. The Cutlers continued as officers of the purchaser to operate the Portland plant. They procured from the purchaser an offer to carry out the contract in full as far as the Portland plant was concerned, including the offer to manufacture the Cook Grader in that

plant to the exclusion of any competing grader. This offer naturally carried with it the offer to use the same diligence to market the Cook Grader that was used in marketing its other products. This offer was made to Cook and Cook definitely and unconditionally refused it and refused to permit continuance of the manufacture of Cook graders at the Portland plant, unless the purchaser would agree to the exclusive manufacture of it at all of the purchaser's plants. This offer remained open to Cook but he declined to accept it. (Master's Report, 63-4, Court's Finding XI (R. 134-5), Cutler's testimony (R. 160), Davies' testimony (R. 190, 192).)

If the Cutlers were bound to continue manufacture of the Cook Grader, as found by the Master, they would have to have some plant to do so. Before the sale they had no plant other than their Portland plant. After the sale they still had the power to devote the Portland plant to the manufacture of the Cook Grader. There is nothing in the contract which required the Cutlers to own the plant in which the Cook Graders were to be manufactured nor is there anything in the contract requiring them to perform the work of manufacturing with their own hands. Therefore, under the contract, the Cutlers had the right to do their manufacturing through such agent or agencies as they might desire, which would include the Portland plant although it would be owned by the purchaser. They offered the purchaser's consent that they do so and their own engagement as directors of the Portland plant to see that it was carried out. Obviously, the fact that they were

the owners of stock in the purchaser, or that one of them was a director of the purchaser, would not disable them from continuing to manufacture Cook Graders. The only thing which did disable them was Cook's positive refusal to permit them to proceed. How, therefore, can it be said that the Cutlers refused to carry out their obligation, if any obligation remained on them to manufacture and sell Cook Graders, when the only reason they did not continue to do so was that Cook forbade them to do it. If there was a repudiation of the contract, it was Cook's own repudiation which the Cutlers, after giving Cook every opportunity to change his mind, finally acquiesced in, thereby working a rescission of the contract by mutual consent.

III.

IF PARAGRAPH ELEVENTH GAVE TO COOK IN THE EVENT OF THE SALE THE THREE OPTIONS STATED BY THE MASTER, THEN THE CONTRACT LACKED MUTUALITY, AND THE CUTLERS HAD A RIGHT TO CANCEL IT.

POINTS AND AUTHORITIES

City of Pocatello v. Fidelity & Deposit Company of Maryland, 267 Fed. 181.

Miami Coca Cola Bottling Co. v. Orange Crush Co., 296 Fed. 693.

Goodyear v. Koehler Sporting Goods Co., 143 N. Y. S. 1046, 116 N. E. 1047.

ARGUMENT

It is of course elementary that a contract which can be terminated at the will of one of the parties without liability for damages, as far as it remains executory, is not binding for want of mutuality. 6 R. C. L. 691.

This Court had before it a case on this point not unlike the present case.

CITY OF POCATELLO V. FIDELITY & DEPOSIT COMPANY OF MARYLAND, 267 Fed 181. Here the city let a contract for enlarging its water supply. The contract contained a paragraph, curiously enough marked Paragraph 11, providing that if "for any reason the City of Pocatello shall fail to make sale of and receive money for the $150,000.00 of water works bonds due to be sold on the 8th day of January, 1917, then in that event this contract at the option of the party of the second part (that is, the city) may be terminated without the party of the second part becoming liable in any manner or upon any account to the party of the first part upon any claim or demand whatsoever." The record was silent as to whether or not the bonds were sold on January 8, 1917, but the City on April 16th notified the contractor that he must proceed by the 19th of April, which the contractor refused to do unless an extension of time was given him for the carrying out of the contract. The city proceeded to construct the water works and sued the surety of the contractor on the contractor's bond for the difference in the cost to the city in constructing

the water works and the contract price in the contract with the contractor. In holding this contract void for lack of mutuality, this Court said:

> City of Pocatello vs. Fidelity & Deposit Co., 267 Fed. 182:
>
> "Under the contract the option of the city was conditional upon the failure to sell the bonds, and the city had the right to exercise the option of terminating the contract at any time. Had Mitchell proceeded with the work, he would have done so, knowing that the city could terminate the contract any time without liability to him in any manner, or upon any account, or upon any claim or demand that he might have had for work he had already done. There is no provision in the contract requiring the city to make an effort to sell its bonds, and no specification as to terms or conditions upon which sale of the bonds was to have been had. The purpose of the city, as made apparent by the language of article 11, was to reserve the right to terminate the contract, provided it did not dispose of its bonds, and in the exercise of such right, to escape any liability to any one upon any claim or demand whatever. A contract of such a nature could not be enforced; it lacks mutuality."

So in the present case the contract recognizes the right of the Cutlers to sell their business. In that event the purchaser not being a party to the contract was in no way required to be bound by it, was not required to take over the contract, or to execute it. It already was manufacturing a grader. Cook refused to allow his machine to be manufactured along with the manufacture of the other machine, but insisted upon the ex-

clusive manufacture of his own machine. He had the alternative, under his option, that if he could not require the purchaser to manufacture, to cancel. No one could compel him to permit the manufacture of his machine for any reason that he saw fit to refuse it. Not being a mutual obligation on both parties it lacked mutuality. Therefore, we submit that when the Cutlers sold their business there was no further enforcibility of the contract on the part of either party.

Miami Coca Cola Bottling Co. v. Orange Crush Company, 296 Fed. 693, the Circuit Court of Appeals of the Fifth Circuit held void for lack of mutuality a contract licensing to Miami Coca Cola Bottling Co. the exclusive right within a certain territory to manufacture and sell a certain drink with defendant's trade-mark. With reference to the facts in the case, the opinion says: (Page 693)

> "This is an appeal from an order dismissing appellant's bill, which seeks to enjoin the cancellation by the appellee of a contract and to compel its specific performance. The contract is in the form of a license, whereby the appellee grants to the appellant the exclusive right, within a designated territory to manufacture a certain drink called 'orange crush', and to bottle and distribute it in bottles under appellee's trade-mark. The appellee agreed, among other things, to supply its concentrate to be used in the manufacture of orange crush at stated prices, and to do certain advertising. The appellant agreed to purchase a specified quantity of the concentrate, to maintain a bottling plant, to solicit orders, and generally to undertake to promote the sale of orange crush, and to develop

an increase in the volume of sales. The license granted was perpetual, but contained a proviso to the effect that the appellant might at any time cancel the contract.

"The bill avers that the appellant bought a quantity of the concentrate, manufactured orange crush, and was engaged in the performance of its obligations, when, about a year after the contract was entered into, the appellee gave written notice that it would no longer be bound.

"(1-2) We agree with the District Judge that the contract was void for lack of mutuality. It may be conceded that the appellee is liable to the appellant for damages for the period during which the contract was performed; but for such damages the appellant has an adequate remedy at law. So far, however, as the contract remains executory, it is not binding, since it can be terminated at the will of one of the parties to it. The consideration was a promise for a promise. But the appellant did not promise to do anything, and could at any time cancel the contract. According to the great weight of authority such a contract is unenforceable." (Citing numerous cases.)

In this case it will be noted that the party to the contract, who was not according to the terms of the contract given the right to cancel, was the one who informed the party having the right to cancel that it would no longer be bound by the contract. In such case neither party is bound. So in the present case the contract recognized the right and possibility of the sale of the Cutler business, and that thereby the right of cancellation existed in one of the parties without any compensating obligation on his part. It lacks mutuality

as shown in the Pocatello case, second above quoted, where the city had the right of cancellation in the event it did not sell its bonds on a certain day.

Goodyear vs. H. J. Koehler Sporting Goods Co., 143 N. Y. S. 1046, 220 N. Y. 749, 116 N. E. 1047. The contract was held void for lack of mutuality, the syllabus of which case reads as follows:

> "A contract whereby plaintiff agreed to purchase from defendant a specified number of automobiles depositing money as part payment in advance on each automobile accepted, but in which defendant nowhere agreed to sell and deliver them, but which gave it the option of delivery, subject to no penalty or damages on refusal to deliver, was void for want of mutuality and was not cured by the appointment of plaintiff as defendant's agent."

IV.

IF APPELLEE WAS ENTITLED TO ANY DAMAGES FROM THE CUTLER PARTNERSHIP AND THE CUTLER CORPORATION IT COULD ONLY BE ROYALTIES WHICH WOULD HAVE BEEN EARNED UP TO OCTOBER 1, 1931, IF THE CONTRACT HAD BEEN FULLY PERFORMED TO THAT DATE.

STATEMENT

Paragraph Seventh of the contract is as follows:

> "SEVENTH: In the event that the commissions for the year 1928 and royalties accruing hereunder to October 1, 1931, do not equal or exceed the sum of $15,000.00, then the company on Octo-

ber 1, 1931, shall pay to the second party such sum as shall be necessary to bring the said total up to $15,000.00, provided that the company shall have the option to withhold payment of such deficit and cancel this contract by giving the second party notice in writing to that effect; and provided further that if the company shall not pay such deficit on or before October 1, 1931, then the second party shall have the right at his option to cancel this contract by giving 10 days' notice in writing to the company to that effect; and in the event this contract is so cancelled by either party as herein provided, then said second party shall have the right to manufacture and sell machines, equipment, devices, and attachments, described in said patent or reissue thereof, and all modifications, alterations and improvements thereof without any claims in favor of the company therein or thereto, as fully as if this agreement had not been made."

It will be observed that this paragraph refers to three different rights in the event the royalties and commissions did not equal $15,000 by October 1, 1931. First, the Cutlers could go on with the contract without Cook's consent by paying Cook the difference between $15,000 and the amount of royalties and commissions previously paid him. Second, the Cutlers could terminate the contract. Third, the Cutlers could refuse to pay the deficit and not cancel in which event Cook could cancel if he wished but still was not required to do so.

This paragraph is somewhat ambiguous but when construed in connection with the Eighth paragraph (R. 128-9) giving either party the right to cancel for any breach by the other party but only after 30 days notice and the opportunity to make good the breach it

seems clear that the foregoing interpretation of paragraph Seventh is correct. Any other interpretation of paragraph Seventh would make unnecessary the part of the paragraph giving Cook an objection to cancel on 10 days notice if the Cutlers failed to pay the deficit on or before October 1, 1931. Cook's right to cancel in the event of non-payment was absolute, there being no provision permitting the Cutlers during the running of the 10 day notice period to continue the contract by making the payment. It would seem therefore that the parties provided the remedy for a failure to pay the deficit and that remedy was and was only the giving to Cook of an option to cancel.

But whatever interpretation is given to this paragraph of the contract it is undisputed that in September, 1929, Cook knew of the proposed sale to Food Machinery Corporation in September, 1929, and that he refused to permit the purchaser to manufacture Cook Graders except to the exclusion of competing machines (R. 148, 160, 182); in January, 1930, F. W. Cutler notified Cook that they considered the contract terminated (R. 148, 160, 181). Cook was advised of the transfer from the Cutler partnership to the Cutler corporation by letter dated April 5, 1930, (R. 159; plaintiff's Exhibit 12) and orally on or about March 17, 1930 (R. 182); he made no protest at the transfer nor did he exercise, or attempt to exercise, any claim to option; Cook had knowledge of the proposed transfer to the Food Machinery Corporation before it occurred and the Master found he had actual knowledge that the Cut-

ler partnership and the Cutler corporation had disaffirmed the contract and "looked upon it as terminated; that they did not intend to and refused to further affirm it in any respect then or at any time in the future" (R. 83). There was no exception to this finding of the Master; Cook knew of the transfer to the Food Machinery Corporation at the time of its occurrence (June, 1930); he knew that among the things transferred was the Cutler plant.

In these circumstances it would seem clear that the rights of the parties became fixed; that if the action of the Cutlers constituted a breach of the contract the breach was complete and the duty was cast upon Cook to do whatever was necessary to minimize his damage. There is authority, to which we shall presently refer, to the effect that on repudiation of a contract the party not at fault may await the termination of the full contract period and then bring his action for damages but this rule if applicable to the peculiar facts of this case certainly gave no right to the present action for damages for a possible failure on the part of the Cutlers to exercise at a later date their right to cancel.

V.

IN THE ABSENCE OF A SUPPLEMENTAL BILL NO ADVANTAGE CAN BE CLAIMED OUT OF MATTERS ARISING AFTER THE SUIT WAS STARTED.

49 C. J. 567;

21 C. J. 540;

Equity Rule 34.

Equity Rule 19.

ARGUMENT

The bill was filed in December, 1930. The contract gave the Cutlers the option to cancel on October 1, 1931. No supplemental bill was filed. And yet the court treated the supposed failure of the Cutlers to exercise the right to cancel by notice given on or about October 1, 1931, as continuing the contract for the full five year period and creating an obligation on the Cutlers to pay Cook the difference between $15,000 and the amount of royalties and commissions which had been paid him prior to the filing of the bill.

It is, of course, elementary that the rights of parties are ordinarily to be determined by the state of facts existing at the commencement of the suit or action and that in the absence of supplemental pleadings all issues are to be determined as of that date. 49 C. J. 567; 21 C. J. 540; Equity Rule 34; Equity Rule 19; Doak vs. Hamilton, 15 Fed. (2) 774, 780. It seems to have been understood by Cook's counsel since he made no attempt

to ascertain from the witnesses whether any written notice had been given Cook by Cutlers of the termination of the contract. The only reference to this subject in the testimony, if it can be said to be a reference to it, was in a colloquy between the Master and F. W. Cutler not set out verbatim in the record, found at pages 995-996 of the transcript of testimony. The Master treated the contract as terminated October 1, 1931. New counsel for appellee excepted on the ground that there was no evidence of the exercise by the Cutlers of the option to terminate at that date and took the position whereby the Cutlers were required to pay the difference between $15,000 and the commissions and royalties already paid and to carry on the contract for the additional two years. This we believe was not permissible in the absence of a supplemental pleading.

VI.

IF THE BREACH, IF ANY, BY CUTLERS CAN BE CONSIDERED AS AN ANTICIPATORY BREACH THEN COOK HAD THE OPTIONS (1) TO CONSENT TO THE TERMINATION OF THE CONTRACT, (2) TO SUE AT ONCE FOR THE BREACH, OR (3) TO KEEP THE CONTRACT ALIVE AND SUE ON IT BUT ONLY AFTER THE END OF THE FULL CONTRACT PERIOD.

6 R. C. L. 1032, 1026;

13 C. J. 701, 653;

Krebs Hops Co. v. Livesley, 59 Ore. 574, 581-2;

Bu-Vi-Bar Petroleum Corp. v. Krow, 40 Fed. (2d), C. C. A. 10th Cir. 488.

ARGUMENT

The cases are not in harmony as to the rights of the injured party in case of repudiation of the contract by the other parties. Some cases reject the doctrine of anticipatory breach entirely. The great weight of authority, however, the Federal courts and the Oregon courts all adopt the rule stated in these texts:

> "It is well settled that, where one party repudiates the contract and refuses longer to be bound by it, the injured party has an election to pursue one of three remedies: (1) He may treat the contract as rescinded, and recover upon *quantum meruit* so far as he has performed; or (2) he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to

perform, and at the end of the time specified in the contract for performance, sue and recover under the contract; or (3) he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing." 6 R. C. L. 1032.

"Where there has been a renunciation of an executory contract by one party, the other has a right to elect between the following remedies: (1) To rescind the contract and pursue the remedies based on such a recission. (2) To treat the contract as still binding and wait until the time arrives for its performance, and at such time to bring an action on the contract for breach. (3) To treat the renunciation as an immediate breach and sue at once for any damages which he may have sustained." 13 C. J. 653.

To the same effect are Bu-Vi-Bar Petroleum Corp. v. Krow, 40 Fed. (2d) 488, 69 A. L. R. 1295, and Krebs Hops Co. v. Livesley, 59 Ore. 574, 581-2.

The adoption of one option of course excludes the others. Cook elected in this case to bring suit at once asking for damages. Upon making this election "the rights of the parties are to be regarded as then culminating, and the contractual relation ceases to exist except for the purpose of maintaining an action for the recovery of damages." 6 R. C. L. 1026. To the same effect is Lake Shore R. Co. v. Richards, 38 N. E. (Ill.) 773. Therefore, the rights of the parties were fixed by Cook's election to sue for damages and could not be altered by anything occurring thereafter and the rule of the least injurious consequences to the defendant

hereafter referred to applies. The damages allowable could therefore not be enhanced by any subsequent failure of the Cutlers to exercise the option to cancel the contract on October 1, 1931.

If the breach be considered not an anticipatory breach then the same result follows. If Cook is to be allowed damages as a result of his suit his rights to damages were immediately fixed and they were to damages only resulting directly from the breach of obligations which Cook had the right then to compel the Cutlers to perform although the performance might be in the future. His rights to damages could not go beyond the point where the Cutlers would have the right to cancel.

VII.

WHERE A CONTRACT IS BROKEN BY A PARTY HAVING AN ELECTION AS TO THE MANNER OF PERFORMANCE THE ALTERNATIVE WILL BE ADOPTED IN MEASURING DAMAGES WHICH IS LEAST INJURIOUS TO THE PARTY HAVING THE RIGHT TO EXERCISE THE CHOICE.

17 C. J. 847;

Custen v. Robison, 167 N. Y. S., 1013;

Holliday & Co. v. Highland Iron & Steel Co., 87 N. E. (Ind.) 249;

Branhill Realty Co. v. Montgomery Ward & Co., 60 Fed. (2d) 922;

Franklin Sugar Refining Co. v. Howell, 118 At. (Pa.) 109;

Kimball Bros. v. Deere, Wells & Co., 77 N. W. (Ia.) 1041.

ARGUMENT

This suit was brought almost one year prior to October 1, 1931. The contract provided for an alternative option in the defendants on October 1, 1931. The court has applied the option most injurious to defendants in arriving at damages. This seems to be in conflict with the general rule on the subject as disclosed in the following citations:

> 17 C. J. 847—"Where a contract is broken by a party having an election as to the manner of performance the alternative will be adopted in measuring damages, which is least injurious to the party having the right to exercise the choice."

Custen v. Robison, 167 N. Y. S. 1013. We quote the following from the opinion, which is self-explanatory:

> "The court did err, however, in stating that this contract was for a term of 2½ years. The contract provided that it was to commence April 1, 1915, and continue for 1½ years, and should be considered renewed for another year from the time that it expires, unless either party gave notice to the other party, in writing, at least two weeks before the expiration of the contract, that they intended not to renew it. The court held that, by reason of the failure of the defendants to give this notice in writing, the contract was automatically by its terms extended for the additional year. The defendants, however, breached the contract November 1, 1915, and refused to go forward with its performance, thereby giving the plaintiff notice not alone that they did not intend to extend it, but they did not intend to perform it until its expiration. There-

fore the amount of damages assessed by the jury for the last 12 months must be deducted."

Branhill Realty Co. v. Montgomery Ward & Co., 60 Fed. (2d) 922 (C. C. A. 2nd Cir.) We quote at 923:

"Assuming that mere payment of rent would not satisfy the lessee's obligation, that it was bound to occupy and make some use of the leased premises, it might, at its option, use them either for a chain store or for any other lawful purpose. Either use would have satisfied its obligation under the proposed lease. Where a promisor has agreed to alternate performances, in case of breach without an election, the damages are measured by the alternative that will result in the smallest recovery. Am. Law Institute Restatement of the Law of Contracts, Sec. 335; Hixon v. Hixon, 7 Humph. (Tenn.) 33; White v. Green, 19 Ky. (3 T. B. Mon.) 155; Franklin Sugar Refining Co. v. Howell, 274 Pa. 190, 118 A. 109, 115; W. J. Holliday & Co. v. Highland Iron & Steel Co., 43 Ind. App. 342, 87 N. E. 249, 253."

Holliday & Co. v. Highland Iron & Steel Co., 87 N. E. (Ind.) 349. We quote from 253:

"Where a contract is entered into between parties, giving to one of them an alternative, and the party having the right of such alternative breaches the contract, in estimating the measure of damages for a breach of such contract that alternative must be accepted which will be least injurious to the party having the right to exercise the choice. Sedgwick on Measure of Damages, Sec. 421."

Franklin Sugar Refining Co. v. Howell, 118 At. (Pa.) 109. We quote at 115:

"If a buyer is given an option to select goods of

differing qualities or prices, he may exercise the privilege within the limitations fixed by the contracts. Berg Co. v. Thomas & Son Co., 266 Pa. 584, 100 Atl. 951.

'When, however, no choice has been made, either expressly by the promisor, or automatically by the terms of the contract, or by law, the measure of damages for the breach of such a contract is the value of the alternative least onerous to the defendant.' 3 Williston on Contracts, 2498; 1 Sedgwick on Damages, Sec. 421; 17 Corpus Juris, 847; 35 Cyc. 600.

"This controlling principle has been thus stated in the leading case of Holliday & Co. v. Highland Iron & Steel Co., 43 Ind. App. 342, 87 N. E. 249:

'Where a contract is entered into between parties, giving to one of them an alternative violates the contract, in estimating the measure of damages for a breach of such contract that alternative must be accepted which will be least injurious to the party having a right to exercise the choice.'

"The same rule is recognized in Kimball Bros. v. Deere, Wells & Co., 108 Iowa, 676, 77 N. W. 1041; Delker Co. v. Hess Spring & Axle Co., 138 Fed. 647, 71 C. C. A. 97; and by leading text writers."

"As already pointed out, the present agreement fixed a price based on barrels of granulated sugar, ordinarily containing 350 pounds, but an option was given to the buyer to designate other kinds, varying in price as well as in the quantity in the container. By the affidavit of defense, defendant could have selected barrels, the contents of which weighed as low as 240 pounds: hence, in the absence of some undisputed averment in the statement that the purchase was of granulated sugar alone, or that no other grade was available for de-

> livery at the time of the breach, defendant could not be charged, in entering judgment for want of a sufficient affidavit of defense, on any other basis than the one least burdensome to him."

Kimball Bros. v. Deere, Wells & Co., 77 N. W. 1041. The plaintiff, a manufacturer of scales, appointed defendant its agent for 5 years in certain territory. He agreed to take 150 sets of scales the first year and take 100 sets per year thereafter during the life of the contract. There were several different types of scales selling for different prices. After receiving 82 sets of scales the defendant agent refused to perform further. The agent claimed the contract was void for uncertainty because there was no way to know what price scales he would have taken had he performed. The trial court observed that the agent had the right to select the scales and therefore in fixing damages it would be assumed that he would have selected those in which the plaintiff would have realized the least profit. This holding was affirmed by the court with the observation that this rule made the contract to that extent definite and certain.

VIII.

THERE WAS NO EVIDENCE TO SUPPORT THE ALLOWANCE OF THE $5,000 ITEM OF DAMAGES.

ARGUMENT

The Master found that, in addition to the royalties and commissions which Cook would have earned if the

contract had been fully performed, Cook should be allowed $5,000 for loss of good will. He stated that it is important in marketing any device that the sales efforts and advertisements be continuous and that, if not continuous, time and money are necessary to re-establish the good will. He stated that he was "not unaware that the assessment of damages of such character closely borders on speculation", but was of the opinion allowance might properly be made. (R. 83-4).

Appellants excepted to this finding on the ground that there was no evidence to support it, that there was no evidence from which a value could be placed upon the good will or as to the amount of money or time necessary to rebuild it, and further that appellee had sufficient notice to have enabled him to protect this alleged good will himself (R. 104). The court overruled the objection and referred to this finding of the Master as one that general damages should be assessed (R. 108).

The court's findings on this subject go much further than the Referee. After reciting the necessity of continuous sales efforts to retain good will and the necessity of expenditure "of efforts to re-establish the market", the court further found that the facilities of the appellee to re-establish a market were less adequate than those of the Cutler corporation and Cutler partnership to maintain a market; that production ceased shortly after the discovery of operating defects in the Improved Cook and, by reason of these things and the failure of the defendants to perform the contract until October

1, 1933, plaintiff sustained general damages in the sum of $5,000 (Finding XVIII, R. 138-9). This finding was made over the objection of the appellants (R. 112).

There was no evidence as to the value of the good will of the Cook Grader. Its primary market, the Medford pear district, was already saturated and the sales in other markets of all of the various types of graders had shrunk to a very small figure in 1930 and 1931. The Master found the earnings which Cook should have received during 1930 and 1931 would amount to $1,500 only for the two years and to reach that sum he had to assume that the market for graders of all types should have been 40% higher than it actually was. It is a notorious fact that since 1931 the food industry has been in such a precarious condition that the market for graders would have been almost nil.

There was no evidence as to the cost of redeveloping a market or of the value of any efforts which might be necessary to accomplish that result. There was no evidence that Cook's opportunity to recreate a market was not as great as that of the Cutlers, especially so after the sale of the Cutler business. There was no evidence as to the probable demand for graders during 1932 and 1933. In short, there was no evidence whatever that we can glean from the record to form a basis for this allowance of $5,000.

In addition, whenever the contract was terminated, whether in 1930, on October 1, 1931, or September 30, 1933, Cook would of necessity be compelled to start his

own advertising and his own production or arrange with some one else to do so. He was put on notice in September, 1929, that the Food Machinery Corporation would not agree to manufacture his grader exclusively. He was given absolute notice in January, 1930, that the purchaser would not take over his contract on his terms and that the Cutlers considered the contract terminated. The Cutlers continued the manufacture of the parts on hand into Cook Graders under the right given them under the Tenth paragraph of the agreement to complete the machines then in the process of manufacture, and they continued to advertise the Cook Grader at least up to the final transfer to the Food Machinery Corporation, thereby covering a substantial part of the period when orders could be obtained. Cook had ample opportunity to start his own advertising campaign where the Cutler campaign left off, thereby maintaining such market as there was and, at least from January, 1930, ample opportunity to get into production. Under these circumstances it is submitted that there was no basis whatever for the allowance of $5,000.

IX.

IN COMPUTING THE PAYMENTS TO COOK UNDER THE CONTRACT THE MASTER AND THE COURT ERRONEOUSLY DEDUCTED THEREFROM $291.53 FOUND BY THE MASTER TO HAVE BEEN EARNED BY COOK UNDER A CONTRACT NOT INVOLVED IN THIS SUIT.

ARGUMENT

The Master found (R. 85-86) there was an oral agreement between the parties appointing Cook agent of the Cutlers in the Medford district for the year 1928; that the parties were in dispute as to whether this agreement entitled Cook to commissions on all of the Cutler machinery sold in the Medford district or only commissions on those sales which were procured by him. The Master found further that the Cutlers had allowed Cook commission on all orders "as to which they believed he was the inciting cause" (R. 86). The Master then said that while not entirely satisfied on the subject he found the oral contract to be as claimed by Cook—that Cook should be given a commission on all sales regardless of whether he secured the orders (R. 86). The Master then found that in addition to the amounts paid Cook under this outside oral contract the Cutlers should have paid him the further sum of $291.53, this covering items of commission where Cook had not secured the orders (R. 89). Thereby the Master reduced by that sum the payments which the Cutlers had made to Cook under the contract of May 4, 1928.

Exception was taken to this finding of the Master (R. 104-5). This exception was overruled by the court (R. 108) and the figures adopted by the Master as the amounts paid by the Cutlers to Cook under the contract of May 4, 1928, were adopted by the court (R. 138) over the objection of the defendants (R. 111).

The mere statement of the action of the court and

the Master demonstrates the error therein. The terms of the oral contract were not an issue in the case and no notice was given the Cutlers that it would be an issue. The Master found that in the accounting they allowed Cook what they thought he was entitled to under the oral contract. If they did not allow him enough, that was a breach of the oral contract and would confer a right of action upon Cook to recover the balance, but only in an action based on the oral contract and not in this suit relating exclusively to the contract of May 4, 1928.

X.

THE LOWER COURT SHOULD IN ITS DISCRETION HAVE APPORTIONED THE COST IN THIS CASE REQUIRING THE PLAINTIFF TO PAY FOR THAT PORTION OF THE RECORD UPON WHICH THE ISSUES WERE DECIDED AGAINST HIM.

ARGUMENT

The transcript of the testimony in this case consisted of 1106 pages. Defendants excepted to the decision of the Master assessing costs against the defendants on the ground that "approximately two-thirds of all of the hearings before the Master consisted of the unsuccessful attempt of the plaintiff to prove the allegations of the complaint that there was a conspiracy on the part of all of the defendants to eliminate competi-

tion; that the defendants Cutler intended to undermine and destroy the plaintiff's machine and business and suppress his products and to impair the efficiency of the machine so as to make it unsuitable for fruit grading, that the Cutlers coerced plaintiff into making the contract of May, 1928, by threats to interfere with plaintiff's trade and nullify his patent rights, that the Cutlers under the pretense of making improvements in the Cook Grader made changes in it which did in fact decrease its efficiency and value in the trade, all of which issues were found against the plaintiff by the Master and found to be wholly unsupported." (Exception VII, R. 106, Assignment of Error XVIII, R. 235.) An examination of the complaint, page 2, will show that the largest part of the allegations of the complaint were directed to the question of conspiracy, threats to undermine the plaintiff's business and to nullify his patent rights and to render his machine less valuable in the trade and to eliminate the machine from competition, and at least two-thirds of the 1106 pages of testimony and exhibits introduced were in an effort to sustain these allegations. This required the additional time of the Master, the additional time of counsel on both sides and of the reporter. All of these issues were decided by the Master and by the court against the plaintiff. In its final analysis, the case was reduced to practically the determination of whether or not the defendants had breached the licensed contract to manufacture and sell the patented article and the assessment of the damages.

f any, therefor. The cause could have been determined
n the form to which it was in fact reduced by an action
t law for the breach of the contract and all of the
quities were decided against the complainant. The
omplainant therefore very much increased the cost of
he record, time of the Master and the expense of the
itigation, and furthermore the issues which caused this
ncreased expense were all decided in favor of the de-
endants and against the complainant. Under these cir-
umstances the court should have apportioned the costs
n proportion to the increased amount caused by the
llegations which plaintiff was unable to sustain. The
ecord was voluminous and adjudged to the complain-
nt the sum of $667.38 costs, as well as the Master's
ee and expenses of $1,275. It is the policy of the
Equity Rules to prevent unnecessary proceedings, as
or instance in assessment of costs for frivolous causes
r delay, by filing improper exceptions (Rule 67,
Equity Rules) and the allowance of costs to one party
r the apportionment thereof has always been within the
ound discretion of the court. We submit the unnec-
ssary pleadings, the amount of time taken up and the
xpense of taking the very voluminous testimony in
he unsuccessful effort of complainant to prove the
llegations of conspiracy, threats and purpose and in-
ention of the defendants to eliminate the complainant's
nachine should warrant the discretion of the court in
reventing such practice by requiring the complainant
o stand the costs of such part of the record, and that the

Master and the lower court abused its discretion in not charging such portion of the record to the complainant. The rule in equity is so well established that we deem it unnecessary to cite authorities. The rule is very simply stated under Section 5 of title "Costs" in 7 R. C. L. page 783, particularly statement on page 784: "And if it appears that it would be inequitable to compel the unsuccessful parties to pay costs, the court may, in the exercise of a sound judicial discretion, refuse costs to either party, may tax each party half the costs, or may impose the costs upon the prevailing party, as where the conduct of a party is unconscientious and oppressive, where complainant could have obtained the relief to which he is entitled without a resort to equity, or where both parties are in fault."

In addition to this the Food Machinery Company, which was in no way a party to the license contract, was haled into court and all issues were found in its favor and the only matter adjudged against it was that, in the event the judgment was not paid by the other defendants, execution might be issued against the property acquired by the Food Machinery Corporation from the defendants Cutler or the Cutler corporation. While not exactly a nominal party to the proceeding it was practically so and the rule with regard to costs under Rule 40 of the Rules of Practice in Equity should certainly be applied to it, that is, that it should be entitled to costs of all the proceedings against it unless the court shall otherwise direct. The Master and the lower court

nder these circumstances refused even to grant costs gainst the complainant in favor of the Food Machinery Corporation.

Respectfully submitted,

JAMES G. WILSON,

JOHN F. REILLY,

Solicitors for Appellants, 508 Platt Building,

Portland, Oregon.